In the Supreme Court of the United States

OCTOBER TERM, 1979

Supreme Court, U. S.
FILED
FEB 2 1980
MICHAEL RODAK, JR., CLERK

No. 79-797

CROWN SIMPSON PULP COMPANY, and
LOUISIANA-PACIFIC CORPORATION,
Petitioners,

v.

DOUGLAS M. COSTLE, Administrator,
Environmental Protection Agency,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Reply Memorandum for Petitioners

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January 31, 1980

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In its Memorandum for the Respondent dated January, 1980, the United States reaffirmed its position, expressed earlier in the joint petition for rehearing to the court of appeals, that the jurisdictional ruling below was erroneous. Although the Memorandum for the Respondent does not oppose granting the writ of certiorari, the United States suggests summary reversal based on its view that the deci-

sion below is not important to future jurisdictional review issues involving Environmental Protection Agency ("EPA") permit actions. While petitioners do not necessarily oppose summary disposition, it should be noted that the premise on which the United States makes its suggestion is erroneous.

The United States' position is based upon the 1977 Amendments to the Clean Water Act, § 402(d)(4). This section now provides that, after an EPA veto of a state-issued NPDES permit, EPA may proceed to issue the permit under certain circumstances. 33 U.S.C. § 1342(d)(4) (Supp. I 1977). The Solicitor General argues that this amendment evidences a congressional intent to make EPA vetoes an unreviewable predicate to EPA issuance of a permit. Thus, according to the United States, the question of which court would review an EPA veto is of little future significance. Memorandum for the Respondent, pp. 7-8.

It should be noted, of course, that this portion of the 1977 Amendments does not apply to this case. Section 402(d)(4) by its terms requires that the veto have occurred after December 27, 1977 in order for EPA to have subsequent permit granting authority. The EPA veto in question here occurred on September 15, 1977. *In re Louisiana Pacific Corp.*, 10 ERC 1841 (1977) (Decision of the Administrator) (Appendix D to Petition for Writ of Certiorari, p. 24).

Petitioners also disagree with respondent's thinly supported assertion that the decision below is of little future importance. Variances based upon "fundamentally different factors" will continue to be available with respect to 1984 standards in most industries, *e.g.*, 44 Fed. Reg. 38746, 38763 (July 2, 1979), and may be assumed to spawn future litigation, thus demonstrating the importance of clear jurisdictional rules. Moreover, the contention by the Solicitor General that EPA vetoes of such variances will never be a reviewable, final agency action is wrong. The argument fails to consider the strong presumption of reviewability, *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140, 141 (1967), let alone suggest "clear and convincing evidence" of a congressional intent to preclude review. *Id.* The Memorandum cites nothing in the Clean Water Act or its legislative history that suggests that Congress intended to shield EPA variance vetoes from judicial scrutiny. Since variance vetoes will likely be reviewed in the future just as in the past, clear jurisdictional standards are essential.*

*The United States' claim of unreviewability also conflicts with the position taken earlier in their joint petition for rehearing to the court of appeals at page 15, where they stated:

> Under the 1977 Amendments, where the Administrator has vetoed a permit and the State does not revise the permit to meet the Administrator's objections, the Administrator may then issue a revised permit. Section 402(d)(4) of the Act, 33 U.S.C. § 1342(d)(4), *as amended by* 91 Stat. 1599. The panel's opinion would make the Administrator's *veto* of the state-granted permit reviewable only in the District Court. However, if the EPA later *issued* a revised permit, that action would only be reviewable in the Court of Appeals. Thus, review of a single permit request involving identical parties and an identical record would be bifurcated. (emphasis in original).

Clearly this passage suggests the reviewability of EPA permit vetoes even after the 1977 Amendments.

Accordingly, the future importance of clear and concise jurisdictional rules is not diminished by the 1977 Amendments. To the contrary, it is both necessary and appropriate for clarification to occur at this time, and the petition for certiorari should be granted.

Dated: January 31, 1980.

Respectfully submitted,

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